Supreme Court, U.S.
FILED
JUL 6 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-35

WALTER LEE HARPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California
90028
[213] 466 7331

Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO._____

WALTER LEE HARPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUKE McKISSACK
Attorney at Law
Suite 521
6430 Sunset Boulevard
Hollywood, California
90028
[213] 466 7331

Attorney for Petitioner

SUBJECT INDEX

	PAGE
TABLE OF AUTHORITIES	iii.
PETITION	-1-
OPINION BELOW	-2-
GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	-2-
QUESTIONS PRESENTED FOR REVIEW . .	-3-
STATEMENT OF THE CASE.	-4-
STATEMENT OF THE FACTS	-8-
REASONS FOR GRANTING WRIT AND AMPLIFYING SAME	-16-

I

THE GOVERNMENT'S USE OF PETITIONER'S PAST CONVICTION FOR PIMPING TO DISCREDIT HIM AS A WITNESS AND INSURE HIS CONVICTION THROUGH THE GUISE OF IMPEACHMENT DENIED HIM THE FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PAGE

MOREOVER, IT CONSTITUTED A DENIAL OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS PROTECTED BY THE FIFTH AMENDMENT. . -16-

II

THE COURT DENIED PETITIONER A FAIR TRIAL, GUARANTEED TO HIM UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY INSTRUCTING THE JURY THAT ALL WITNESSES ARE PRESUMED TO SPEAK THE TRUTH . . . . . -33-

CONCLUSION . . . . . -39-

INDEX TO APPENDIX

APPENDIX "A" - Opinion of the court below . . . . . -1-

TABLE OF AUTHORITIES CITED

CASES	PAGE
Brown v. United States (1966) 370 F.2d 242	24,25
Bruton v. United States 88 S.Ct. 1620	20,31
Jackson v. Denno 378 U.S. 368	20,31
Leary v. United States (1969) 89 S.Ct. 1532 395 U.S. 6	29
Luck v. United States (1965) 348 F.2d 763	22,24
McMillen v. United States (1st Cir. 1967) 386 F.2d 29	34,35,36,38
People v. Aranda (1965) 63 Cal.2d 518	20,31
People v. Haston (Aug.1968) 69 A.C. 237	19
Tot v. United States (1943) 319 U.S. 463 63 S.Ct. 1241	28
United States v. Gainey (1965) 380 U.S. 63 85 S.Ct. 279	29
United States v. Johnson (3rd Cir. 1967) 371 F.2d 800	37

PAGE

United States v. Meisch (3rd Cir. 1966) 370 F.2d 769 — 36,37,38

United States v. Romano (1965) 382 U.S. 136, 86 S.Ct. 279 — 29

STATUTES AND CODES

United States Constitution
Fifth Amendment — 16
Sixth Amendment — 16

California Evidence Code
§352 — 19

MISCELLANEOUS

Borchard, Convicting the Innocent 158-64 (1932) — 17

Ladd, Credibility Tests -- Current Trends, 89 — 17

McCormick, Evidence, Section 43 (1954) — 17,19,20,21

1 Wigmore, Evidence, Section 194 (3rd Ed.) (1940) — 19

78 Harv. L.Rev.426 (1964) — 18

19 Hast.L.J. 919 (1968) — 18

70 Yale L.J. 763 (1961) — 18

University of Pa. L.Rev.166 (1940) — 18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. [redacted]

WALTER LEE HARPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Walter Lee Harper, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District

Court for the Central District of California, sentencing Petitioner to five years imprisonment.

OPINION BELOW

Trial in the Federal District Court was by jury.

The opinion of the Court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is, as yet, not reported. The Judgment of the Court below is contained in the Clerk's transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is June 29, 1970 (R.C.A. Judgment).

QUESTIONS PRESENTED FOR REVIEW

I. THE GOVERNMENT'S USE OF PETITIONER'S PAST CONVICTION FOR PIMPING TO DISCREDIT HIM AS A WITNESS AND INSURE HIS CONVICTION THROUGH THE GUISE OF IMPEACHMENT DENIED HIM THE FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MOREOVER, IT CONSTITUTED A DENIAL OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS PROTECTED BY THE FIFTH AMENDMENT.

II. THE COURT DENIED PETITIONER A FAIR TRIAL, GUARANTEED TO HIM UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY INSTRUCTING THE JURY THAT ALL WITNESSES ARE PRESUMED TO SPEAK THE TRUTH.

STATEMENT OF THE CASE

I

On April 8, 1970, there was filed in the United States District Court for the Central District of California, a two-count indictment charging Walter Lee Harper and Lawrence Rogers with a violation of 18 U.S.C. §472 and 18 U.S.C.§473 (Possessing Counterfeit Government Obligation; Dealing in Counterfeit Government Obligation), Indictment Number 5800 CD.

II

On April 27, 1970, both defendants were appointed counsel, arraigned and entered pleas of Not Guilty. The case was then assigned to the Courtroom of Judge Carr for further proceedings. In said courtroom, the case was scheduled for jury trial for June 2, 1970, at 10:00 AM.

III

On June 2, 1970, defendant Lawrence Rogers withdrew his plea of not guilty to Count I of the Indictment and pled guilty to same. A pre-sentence investigation report was ordered and sentencing of defendant Rogers was continued to June 29, 1970, at 10:00 AM. Defendant Harper's appointed counsel was relieved and retained counsel, J. B. Tietz, was substituted in as attorney of record. Defendant Harper answered ready for jury trial and a jury was chosen and sworn on that day, with proceedings continued to June 3, 1970.

IV

The trial resumed on June 3, and also concluded on said day with the jury returning verdicts of guilty as charged in Counts I and II of the Indictment. The case was referred to the Probation Officer

for a pre-sentence report concerning Defendant Harper and continued to June 29, 1970, for sentencing.

V

On June 29, 1970, the Honorable Charles H. Carr sentenced Defendant Harper to imprisonment for a period of five years on each count, sentences to run concurrently. Judge Carr suspended the imposition of sentence on Defendant Rogers and placed him on probation for a period of three years.

VI

Defendant Harper filed a Notice of Appeal on June 29, 1970, and bail on appeal was set at $15,000.00 corporate surety.

VII

On October 21, 1970, an Order of the United States Court of Appeals for the

Ninth Circuit was filed granting the Appellant leave to appeal in forma pauperis.

VIII

On June 4, 1971, the Ninth Circuit Court of Appeals affirmed the judgment in the opinion herein attached as Appendix "A".

STATEMENT OF FACTS

(All references, unless otherwise noted, are to the Reporter's Transcript.)

The Government's case in chief consisted of the following witnesses who testified as follows:

1. Lawrence Thomas (pp.39-75) met Secret Service Agent Richard Artison, by pre-arrangement, on March 12, 1970, was searched by said Agent, and then was driven to the home of the Petitioner and given $100.00 in U.S. currency. Mr. Thomas requested of the Petitioner that the latter sell him $1,000.00 in counterfeit currency. He agreed, for the price of $260.00 and instructed Mr. Thomas to return the next day. Mr. Thomas had been acquainted with the Petitioner since November, 1969, and had been to his house on two or three occasions. He was also aware that the

Petitioner's house was an "after-hours" club. Mr. Thomas' motivation for cooperating with Agent Artison was not clearly brought out; however, Mr. Thomas did admit that he had "been busted" during Christmas for possessing counterfeit currency.

On the next day, Mr. Thomas returned to the Petitioner's home with Agent Artison, after a search of his person was made, Mr. Thomas was given $100.00. Mr. Thomas waited in the Petitioner's home for a little while and a second man arrived with a bag. The Petitioner gave Mr. Thomas $1,000.00 in $10.00 bills in exchange for $260.00 (which Mr. Thomas had obtained from the Agent).

2. Lawrence Rogers (pp.76-90), the former co-defendant who previously pled guilty to Count I of the indictment, received a phone call on the 12th of March

from a voice which he recognized to be that of Petitioner - Harper. The latter asked if Rogers could obtain $1,000.00 in counterfeit money and Mr. Rogers said he would have to check and would call back. Upon said return call, Mr. Rogers stated that the money could be obtained and that he (Mr. Rogers) would bring it to the Petitioner's home the next evening. Accordingly, the next evening he arrived at the Petitioner's home with a brown package which he gave to Defendant Harper and then went to another part of the house. Later Mr. Harper gave Mr. Rogers $150.00 with the statement that he (Mr. Rogers) would receive the rest of the money when "he (Harper) get [sic] rid of the rest of the money".[p.87,88] Rogers was arrested that night at the home of Petitioner.

3. Richard E. Artison (pp.93-124) was a United States Secret Service Agent on March 12, 1970, who was utilizing Lawrence Thomas as an informant in an investigation concerning the distribution of counterfeit money. When he met Thomas on the aforementioned date, he searched him to ascertain if Thomas was in possession of any counterfeit money at that time. Agent Artison said that his search revealed no counterfeit money on Thomas. The two proceeded to an address on Denver Street where inquiry by Thomas was made regarding the whereabouts of a person named "Kingfish" (identified by Thomas as Petitioner Harper). Other units were at the scene of the residence on Denver in a surveillance capacity. Agent Artison observed the Petitioner on the street appear to have a conversation with Thomas and then observed the two of them to disappear into the residence of 5871 Denver.

The following night Agent Artison again met the informant and searched him. Then he gave the informant $100.00 in ten dollar bills. The two of them returned to the address on Denver and Thomas entered the house. Some time later, Thomas returned and the Agent gave him an additional $160.00. (All these monies having been previously given to Artison by other agents, specifically, Agents Griffiths and Agent Welch). Thomas returned to the house and later exited it with a bag in his possession containing $1,000.00. Agent Artison qualified as an expert in the detection of counterfeit versus authentic United States Currency and opined that the $1,000.00 in ten dollar bills received from Thomas were counterfeit.

4. Raymond A. Shaddick (pp.125-131), an employee of the United States Secret Service, testified that the counterfeit

money was in his custody from the time he received it from Agent Artison to the time of his court appearance.

5. David P. Welch (132-135), another Secret Service Agent searched the Petitioner upon his arrest on March 13, at his home, and found in his pocket eleven $10.00 genuine bills which matched the serial numbers of the bills on a list kept by Agent Griffiths.

6. James S. Griffiths (135-142), an employee of the Secret Service gave Agent Artison $250.00 in ten dollar bills, the serial numbers of which he made note, and said marked bills were the same ones as those recovered from the Petitioner.

7. Thomas C. Kupferer (142-146), a United States Marshal, fingerprinted the Petitioner when he was arrested.

8. James L. Parker (146-165), a fingerprint expert, testified that on one of the counterfeit bills he discovered a print which matched an inked fingerprint of the Petitioner.

The case for the defense began with the testimony of the Petitioner, Walter Lee Harper (168-174), who stated that a portion of his house was utilized for gambling and that on the night in question, he was shooting dice with many people, among whom was Lawrence Thomas; money was on the table and it was possible that Mr. Harper's fingerprint was upon some money that was in the dice game. Mr. Harper was impeached by the Assistant Attorney General by an admission of having been previously convicted of a felony (pimping) (173,174).

The defense also called to the witness stand Curley S. Beaird (175-177) and Willis S. Humphries (178), who both verified the

fact that a portion of the Petitioner's home was used for entertainment in the form of gambling on a combination pool and dice table.

In rebuttal, the Government presented the testimony of Billy Thomas (181-187), who was present at the Petitioner's house during the time of the alleged sale. Billy Thomas saw Lawrence Thomas in the living room, then enter the bedroom of the Petitioner, then leave the house, return and leave again.

Lawrence Thomas (189) resumed the stand for the rebuttal testimony that he did not play dice with Mr. Harper that night.

The Petitioner resumed the stand for surrebuttal (190) to state that he did not go into his bedroom with Lawrence Thomas.

I

THE GOVERNMENT'S USE OF PETITIONER'S PAST CONVICTION FOR PIMPING TO DISCREDIT HIM AS A WITNESS AND INSURE HIS CONVICTION THROUGH THE GUISE OF IMPEACHMENT DENIED HIM THE FAIR TRIAL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION. MOREOVER, IT CONSTITUTED A DENIAL OF HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS PROTECTED BY THE FIFTH AMENDMENT.

A

The Denial of a Fair Trial

During the defense phase of the case, the Petitioner offered himself as a witness (168-74). After giving a credible account of his activities on the date in question, he was impeached by virtue of the Government

bringing to the attention of the jurors a prior conviction for pimping (173-174). Needless to say, he was not on trial for pimping, but rather counterfeiting, and needless to say, the concession to having at one time been a pimp bolstered immeasurably the prosecution's case through this revelation of a sordid incident in the Petitioner's past.

Defense counsel's vigorous objection was overruled (173-174). We complain!

The practice of impeaching a defendant in a criminal action by his prior convictions has been criticized by thoughtful legal scholars. See, for example:

McCormick, Evidence, Section 43 (1954);

Borchard, Convicting the Innocent, 158-64 (1932);

Ladd, Credibility Tests - Current Trends 89

University Pa.L.Rev.166,184 (1940);

Note, 70 Yale L.J. 763 ,774-78 (1961);

Note, 78 Harv.L.Rev. 426, 440-42(1964);

Note, 19 Hast.L.J. 919 (1968).

On the issue of credibility, evidence of the prior misconduct of any witness is generally very weak evidence. It is weak because from a general bad character inferred from the misconduct, it must further be inferred that the witness has a specific propensity to lie and further that he is in fact lying on the stand.

When the witness is the defendant in a criminal action, he suffers not only from the ordinary prejudice engendered by bad character evidence, but also from the prejudice created by the obvious relevance of the prior conviction to the question of guilt. The danger is that the jury is likely to consider the accused a person

who would commit the crime charged merely because of his past record, or, that without too much concern for the insufficiency of the evidence, they may think that he is the kind of person who ought to be put away. [See McCormick, Evidence, §43 at p.93 (1954); 1 Wigmore, Evidence, §194 at p.646, 3rd Ed. (1940)].

> "We need not dwell upon the substantial prejudicial effect of evidence of defendant's prior offenses in a criminal case." People v. Haston, 69 A.C. 237, 251 (Aug. 1968).

Thus, the offer of such evidence under the cloak of credibility creates "substantial danger of undue prejudice." (cf. Cal. Evid. Code, §352.)

It is true that the jury may be instructed that evidence of a prior conviction is limited to the issue of credibility. The

limiting instruction, however, does little good. (See McCormick, Evidence, §43 at p.93). Recent jury studies conducted by the University of Chicago indicate that jurors almost universally fail to limit evidence of prior convictions to the issue of credibility, despite limiting instructions from the judge. (See authorities cited in 70 Yale L.J. 763, at 77, Note 89).

More and more courts are recognizing the inadequacy of limiting instructions which request that jurors disregard the obvious and exclude it from their minds. See discussion and cases cited in Bruton v. United States, 88 S.Ct. 1620; Jackson v. Denno, 378 U.S. 368; see also, People v. Aranda, 63 Cal.2d 518, 524-26, 528-31 (1965).

The defendant in a criminal action who has a prior felony conviction, therefore, faces a dilemma. If he testifies, he suffers

the substantial danger that his prior conviction will be used against him on the question of guilt. If he does not testify, "his silence alone will prompt the jury to believe him guilty." (McCormick, Evidence at p.93).

In People v. Haston, 69 A.C. 237,251, the California Supreme Court held that, although it was within the sound discretion of the trial court to admit evidence of other offenses to prove identity,

> "...that discretion must in all cases be exercised within the context of the fundamental rule that relevant evidence whose probative value is outweighed by its prejudicial effect should not be admitted."

This fundamental rule also applies to evidence of other offenses offered for impeachment.

The United States Court of Appeal for the District of Columbia Circuit has developed a rule of judicial discretion to exclude impeachment by prior conviction.

In Luck v. United States, 348 F.2d 763, (1965), after reversing a conviction on other grounds, the Court of Appeals stated that upon retrial:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.* There may well be cases where the trial judge might think that the cause of truth would be

*The statute 14 D.C. Code #305 (1961) -- is virtually identical to Calif.Evid. Code §788.

helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field.

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the

extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." [Luck v. United States, 348 F.2d 763, 768-769 (footnotes omitted).]

In Brown v. United States, 370 F.2d 242 (1966), the Court of Appeal reversed a conviction on the ground that the trial court had abused its discretion in ruling that the defendant could be impeached by a prior conviction. The Court found what it called "a classic illustration of a case in which 'the prejudicial effect of impeachment far outweighed the probative relevance of the prior conviction to the issue of credibility.' " (Brown v. United States, supra, 370 F.2d at 245, quoting from Luck v. United States, 348 F.2d 736, 768.)

In Brown, a defendant charged with assault with a dangerous weapon, did not testify after the trial court ruled that he could be impeached by his recent conviction on a similar charge of assault with a dangerous weapon. To the Court of Appeal, this prior was of little probative value on the issue of credibility, but it was very prejudicial on the issue of guilt or iinocence. Moreover, there was evidence that shortly before the assault, the defendant had been severely beaten and he acted irrationally, and thus his own testimony was vital to this defense of unconsciousness.

In the present case, the Petitioner should have been permitted to have the benefit of a fair trial on charges of possessing counterfeit currency unhindered by impeachment on the quite dissimilar and repulsive crime of pimping. If it is

unjust and unseemly, as we contend, to have the prior conviction for pimping come into Court as evidence of guilt, then it should not be allowed to enter under the transparent cloak of impeachment. Only a reversal of this cause can furnish the Petitioner the fair trial to which he is entitled.

B

Denial of Due Process and Equal Protection of our Laws

In the first place, it is axiomatic that in order to survive the application of the Equal Protection concept contained in the Due Process guarantee of the Fifth Amendment to the Federal Constitution, the impeachment of a defendant via a felony conviction must not invidiously discriminate between that individual either threatened with impeachment or so impeached and other

nondescripts not so burdened with past felony records. If it were not for the limiting instruction that the felony may be utilized only in evaluating the defendant's credibility as a witness, such an attempt to merely stigmatize an individual so as to lessen his chances of a fair and impartial verdict on present charges would be met with the most severe reproach. In other words, only by establishing some relevancy between the past conviction and the present litigation can the Government constitutionally create two classes of defendants - those whose guilt or innocence is determined by matters relating to the pending cause and those who must suffer the additional burden of hearing their criminal past paraded before the jury.

The next step in justifying the existence of those two categories of suspected offenders is to exhibit some justifiable rational connection between the fact of a felony conviction and the presumption that this constitutes probative data on the issue of credibility. Finally, it is necessary to assume that the jury -- the trier of fact -- can limit the effect of this testimony without allowing this precious knowledge of the defendant's sordid past to seep over into the determination of guilt or innocence in general.

Within the aforegoing format, let us proceed to analyze the link, if any, between the existence of a prior felony conviction and the assumption of diminished present veracity. If the fact of a felony record were legislatively stated to be the basis of a permissible inference by the jury that the defendant was untrustworthy, it is clear that the test formulated in Tot v.

United States, 319 U.S. 463, 63 S.Ct.1241 (1943) and clearly in reign by virtue of Leary v. United States, 89 S.Ct. 1532, 395 U.S. 6 (1969); United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754 (1965); and United States v. Romano, 382 U.S. 136, 86 S.Ct.279 (1965) would provide the criterion under which the presumption or inference authorized would be judged. That test simply is "that there be a rational connection between the fact proved and the fact presumed." (89 S.Ct. at 1546). The fact that the assumed nexus between the commission of a felony and the fact of dishonesty is the legislative rationale underlying the impeachment statute rather than the statute itself cannot serve to avoid the analysis necessary under Leary, Tot and Co., for to do so would allow a conviction to be affected by a sub rosa police of a legislative body which if elevated to a rule of law could

not survive Constitutional objection.

Thus, the relevant question is what evidence is there that the mere fact that a person has experienced a felony conviction at some point, any point, in his past makes it probable that as a present day witness he is untruthful. Petitioner submits there is none! On the contrary, that this contention is unsupportable is amply attested to by the scholars who have written on the subject (See Section A, supra) and the dearth of empirical findings or an attempt at any by those who seek to preserve the rule. Can this Court in all honesty say that with the alphabetical jungle of the penal law the mere fact that a crime is classified as a felony is a comment on the veracity of its perpetrator? If not, does a past conviction for pimping, not involving

honesty, mean that that crime tends to prove that the defendant was un unreliable witness in 1969? Of course not!

Even if there was an informed legislative basis for this connection, which there is not, can we say that a limiting instruction whereby the jury hears of the awful deed and considers it for purposes of believing the defendant but is told to disregard it with reference to his guilt of any contemporary misdeeds is sufficient to dispel that awful tendency to convict today for what happened in yesteryear. The entire body of law germinated by Jackson v. Denno, 378 U.S. 368, and taking the shape of Bruton v. United States, 88 S.Ct. 1620 and People v. Aranda, 63 Cal.2d 518 (1965) sets itself squarely against such a contention.

Counsel feverishly maintains that with all of the decisions designed to protect defendants against abuses and potential

abuses in recent years, the felony impeachment problem has escaped careful review. In fact, we urge that the resolution of this issue is less troublesome than many of those which have preceded it and been resolved in favor of additional defense prophylactics against an unfair trial. Judge Drucker, formerly of the Los Angeles County Superior Court, a few years ago referred to the provision allowing the prosecution to impeach a defendant with his past record as the foremost obstacle to a defendant receiving a fair trial. In fact, he cannot and the time to unearth that ugly principle is via this Court, now.

II

THE COURT DENIED PETITIONER A FAIR TRIAL, GUARANTEED TO HIM UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY INSTRUCTING THE JURY THAT ALL WITNESSES ARE PRESUMED TO SPEAK THE TRUTH.

In a case such as the instant one, the issue of the credibility of the informant and the accomplice (Lawrence Thomas and Lawrence Rogers) is of such decisive importance that any error which would tend to confuse the jurors concerning the applicable law regarding presumptions of credibility must be viewed as a denial of the defendant's right to a fair trial.

The Court instructed the jury (R.T. 222,225) that a witness is presumed to speak the truth. This instruction has been the subject of judicial criticism in several cases, the leading one being

McMillen v. United States (1st Cir.1967) 386 F.2d 29. While the facts in said case were slightly different from the within case, that is, the Court in McMillen failed to give a cautionary instruction regarding the testimony of accomplices; the reasoning of the Court is applicable herein because the giving of the "presumption of truthfulness" instruction is contrary to the "cautionary" instruction in the mind of the layman, and the conflict would have to be resolved in favor of following the "presumption" instruction since it states that such a presumption has to be "outweighed" before the jury can discount it. Thus, the conflict and confusion in the mind of the jury in the within case may be tantamount to their ignoring any "cautionary" instruction regarding the

testimony of the informant (Thomas) and the accomplice (Rogers).

The McMillen Court pointed out that the accomplices had not "paid their price to society and were [not] free from carrot or stick". [386 F.2d 36.] And likewise was the position of both Rogers and Thomas when they testified against the defendant. Rogers pled guilty to one count of the indictment a few moments before the trial of Harper began (pp. 5-9). His sentence was postponed to a future date (p.10), and there can be no doubt that the government and co-defendant Rogers long before the trial date prepared for his testimony (p.3). Informant Thomas appeared to be in some trouble with the law also. (p.62). It can be easily concluded that without the testimony of Thomas and Rogers, the Government did not have a case against Harper. Thus,

Rogers and Thomas were also not free from "carrot or stick".

Since the informant and the accomplice were in such a personally vulnerable position at the time of their testimony, this fact should have been greatly emphasized to the jury, so that they realized, in no uncertain or conflicting way, that the testimony of an accomplice or an informant must have been reviewed with caution. And yet, Lawrence Thomas and Lawrence Rogers were presumed to tell the truth. And it is this presumption that the Courts are concerned with:

> "In recent years this instruction has come under repeated attack for its absence of support in either authority or logic..." McMillen v. United States, 386 F.2d at 29.

In United States v. Meisch, (3rd Cir.

1966), 370 F.2d 768, the Court ruled that such a presumption conflicted with other and far more important aspects of the law which the jury receives, such as the presumption of innocence and the burden of proof. While noting that there was an absence of authority for the "presumption of truthfulness" instruction, the Court pointed out that it impinges upon the jury's right to determine credibility.

A conviction was specifically reversed in United States v. Johnson (3rd Cir.1967) 371 F.2d 800, when the instruction was given over objection.

Although the defendants in the Meisch and Johnson cases did not offer defense evidence (the instruction was thus a statement to the jury that they must find the Government's witnesses credible), the analysis of the defects of the "truthfulness"

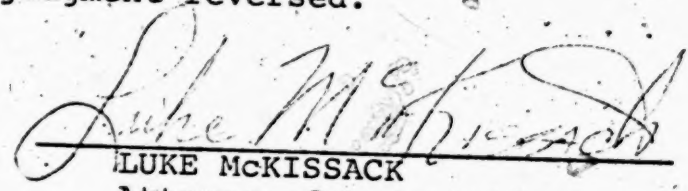
instruction is equally applicable to cases where defense testimony is given. McMillen v. United States, 386 F.2d at p.33. As the McMillen Court stated:

> "Even where, as here, the defense offers witnesses, the impact on each side of the presumption of truthfulness is not necessarily equal". 386 F.2d at 33.

Thus, the problem presented by the conflict between the presumption of truth instruction and the cautionary instruction cannot be so easily solved, as the Government would contend, merely by saying that the defendant and his witnesses also had the benefit of the presumption. Especially when there is precedent for the position that the instruction is erroneous to the extent of tampering with the presumption of innocence. United States v. Meisch, supra.

CONCLUSION

Petitioner prays that the Petition for a Writ of Certiorari should be granted and the judgment reversed.



LUKE McKISSACK
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WALTER LEE HARPER,
Defendant-Appellant.
No. 26,623

[June 4, 1971]

Appeal from the United States District Court
Central District of California

Before: BROWNING, CARTER and TRASK, Circuit Judges

PER CURIAM:

Harper appeals from a conviction in the district court for violations of 18 U.S.C. §§ 472 and 473 (possessing and dealing in counterfeit government obligations). His sole contentions are:

(1) That the district court erred in allowing the government to introduce evidence of appellant's prior conviction to impeach appellant after he testified in his own behalf.

(2) That the district court erred in instructing the jury that all witnesses are presumed to speak the truth. We affirm.

(1) It is well settled in this circuit that a defendant who takes the stand may be impeached by the use of a prior felony conviction. *Nutter v. United States* (9 Cir. 1969) 412 F.2d 178, 182, *cert. denied* 397 U.S. 927 (1970). *United States v. Allison* (9 Cir. 1969) 414 F.2d 407, 411-12, *cert. denied* 396 U.S. 968 (1969).

Here, the appellant objected to the question concerning the prior felony, on the ground that the question was outside the scope of cross-examination. Where there is a "meaningful invocation" of the courts' discretion, the district court on consideration of certain criteria, may refuse to admit the prio conviction into evidence. Absent such an invocation of the district courts' discretion, re-

EXHIBIT "A"

versal is not warranted. *United States v. Allison, supra,* p. 411-412.

(2) There was no objection to the instruction in the court below. The instruction has been used traditionally in this circuit. Any question regarding the instruction will not be considered when raised for the first time on appeal. *Smith v. United States* (9 Cir. 1968) 390 F.2d 401; *Marsh v. United States* (9 Cir. 1968) 402 F.2d 457.

The judgment is affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 6-9-71—360

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, Suite 521, Hollywood, California, 90028. On July 5, 1971, I served the within PETITION FOR WRIT OF CERTIORARI on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
12th Floor, U.S. Courthouse
Los Angeles, California 90012

U.S. Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, California

Solicitor General
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true

and correct.

Executed on July 5, 1971, at Los Angeles, California.

Louise A. Monaco

LOUISE A. MONACO